

1 BEFORE THE BOARD OF PERSONNEL APPEALS

2 IN THE MATTER OF GENEVIEVE A. NEWMAN

3 ULP- 8-1975

4 Complainant:

5 FINDINGS OF FACT,  
6 CONCLUSIONS OF LAW,  
7 RECOMMENDED ORDER,

8 -vs-

9 BATAVIA SCHOOL DISTRICT NO. 26 and  
10 BATAVIA BOARD OF TRUSTEES.

11 Defendant:

12 a a d b b b w e s a b h d a d a s a w e s a d w m b w

13 STATEMENT OF CASE

14 On July 20, 1975, Mrs. Genevieve A. Newman, a school teacher employed  
15 by Batavia School District No. 26, filed an unfair labor practice charge with  
16 the Montana State Board of Personnel Appeals against Batavia School District  
17 No. 26 and the Batavia Board of Trustees, (hereafter referred to as the School  
18 Board).

19 The charge alleges that Section 59-1605 (1)(c) R.C.M. 1947, was violated  
20 in that the School Board discriminated against Mrs. Newman with respect to wages  
21 and other conditions of employment in order to discourage membership in her  
22 affiliate labor organization. The charge further alleges that such discrimination  
23 interfered with and restrained Mrs. Newman from exercising her collective  
24 bargaining rights as guaranteed under Section 59-1603 R.C.M. 1947, and thus  
25 constitutes a violation of Section 59-1605 (1)(e) R.C.M. 1947.

26 The School Board filed an answer to the charge on August 19, 1975 which  
27 basically denied the allegation that the School Board had engaged in discrimination  
28 with respect to Mrs. Newman's wages and conditions of employment for purposes  
29 of discouraging membership in her affiliate labor organization.

30 A hearing was held on September 4, 1975, in the Schoolhouse at Batavia.  
31 Plaintiff, Mr. Michael P. Keedy, Director, Uniserv Region 1, Montana Education  
32 Association, represented Mrs. Newman. The School Board was represented by Mr.  
33 Jerry Wittlake, Vice Chairman of the Batavia Board of Trustees.

34 As the duly appointed hearing examiner of the Board of Personnel Appeals,  
35 I conducted the hearing in accordance with the provisions of the Montana Adminis-  
36 trative Procedures Act (Sections 82-8201 to 82-8225, R.C.M. 1947).

1 After thorough review of the entire record of this case,<sup>1</sup> including the  
2 sworn testimony of a number of witnesses, I make the following:  
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4 **FINDINGS OF FACT**

5 **THE ALLEGED UNFAIR LABOR PRACTICE**

6 1. Mrs. Newman is a class-five, certificated teacher and has taught  
7 third and fourth grade elementary education in Batavia School District No. 26  
8 for some nine years. She is one of four teachers in this rural district and the  
9 only member of the Montana Education Association, (hereafter referred to as MEA).<sup>2</sup>

10 On March 10, 1975, Mrs. Newman attended a meeting of the Batavia Board of  
11 Trustees. She attended this meeting because she felt it necessary to discuss  
12 with the School Board disciplinary problems within her classroom. Mrs. Newman  
13 testified that sometime in October of 1974, someone on the Board of Trustees  
14 had remarked that Mrs. Newman would be "sacked" or "canned"<sup>3</sup> and this made it  
15 difficult to discipline children in her classroom.

16 During the course of this Board meeting, Mrs. Newman was told to resign  
17 or her contract would be terminated. Mrs. Newman also alleges that she was  
18 degraded in front of two sets of parents. As a result of the position taken  
19 by the Board of Trustees, Mrs. Newman contacted Mr. Keedy as Director of the  
20 Montana Education Association's Uniserv Region 1.

21 2. Mr. Keedy prepared a letter in behalf of Mrs. Newman which was sent  
22 to the School Board on March 12, 1975. (Complainant's Exhibit A). The letter  
23 informed the School Board that MEA represented Mrs. Newman and requested that  
24 Mrs. Newman be furnished with a written notice of any charges or allegations  
25 against her. It also requested sufficient time to prepare for and meet any

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- 27 2. I had considerable difficulty with the tape recording of the record.  
28 The equipment I brought with me malfunctioned and I was forced to  
29 borrow a small tape recorder. Nevertheless, I obtained all but a few  
30 minutes of the hearing which had to be continued. When the hearing did  
31 continue I informed the parties of the small gap in the record, provided  
32 a transcript of the hearing just before and after the gap and permitted  
33 the parties to fill in this gap to their satisfaction.
- 34 3. More appropriately, Mrs. Newman is a member of the Flathead County  
35 School Teachers Association, an affiliate of the Montana Education Association.
- 36 3. Mr. Wittiske objected to this testimony as hearsay. I overruled the  
37 objection as Mrs. Newman was attempting to give her reasons for attending  
38 the March 10, 1975 Board Meeting. I am not concerned with the validity  
39 of her allegation.

1 charges or allegations and "confront and cross-examine any detractors".

2 The Board did hold a meeting to consider the matter on March 17, 1975  
3 over Mr. Keedy's protest that he could not be present to represent Mrs.  
4 Newman. Mrs. Newman was advised by Mr. Keedy not to attend this meeting without  
5 his accompaniment.

6 At the March 17 School Board meeting, it was decided that Mrs. Newman's  
7 contract would not be renewed for the coming 1975-1976 school year and on  
8 March 24, 1975, Mrs. Newman was handed a letter formally notifying her of this  
9 decision (Complainant's Exhibit B). Cited as reasons for this decision were  
10 frequent absence, complaints from parents, and Mrs. Newman's alleged inability  
11 to control her classroom among other allegations. (Please refer to point of fact  
12 #8 ). The letter was signed by all three Board members.

13 3. On April 7, 1975, the Board of Trustees held another meeting and  
14 again considered the non-renewal of Mrs. Newman's contract. Mrs. Newman was  
15 present and represented by Mr. Keedy. The result of the meeting (the meeting  
16 was intended, I assume, to be a hearing in the most informal sense) was that the  
17 Board decided to rescind its decision of March 17, 1975. At the April 7th  
18 meeting, Mr. Wittlake stated that the Board would be "shot down" if they  
19 pursued the matter further.<sup>4</sup>

20 Mrs. Newman received a letter dated April 9, 1975, which formally acknowledged  
21 that the Board had rescinded its decision.

22 4. On June 9, 1975, the School Board held a meeting in order to issue in-  
23 dividual contracts. At this meeting, the School Board passed out individual con-  
24 tracts which specified various working conditions but did not specify salary  
25 amounts. The record is exiguous as to just how individual teacher salaries are  
26 determined<sup>5</sup> but it appears that at least one of the teachers had reached an informal

27 4. I assume both complainant's Exhibit B and the hearing held April 17, 1975,  
28 were a result of the School Board's attempt to comply with Section 75-6104,  
29 R.C.M. 1971, which addresses the termination of tenure teacher services.

30 5. Although salary schedules are called for in policies set by the School  
31 Board (Complainant's exhibit 1), it appears that formal salary schedules  
32 are not maintained. It also appears that the School Board informally arrives  
at individual teacher salaries.

Mr. Mike Welling testified that he had basically agreed with the School  
Board on his salary through some sort of informal negotiations well before  
the June School Board meeting. -3-

1 agreement with the School Board on his salary prior to the June meeting. During  
2 the meeting the teachers agreed formally on salary amounts (which included pay  
3 increases up to 9.4%) and the contracts were signed.

4 Mrs. Newman was the exception as she was the only teacher in the school  
5 district that did not receive a salary increase. She disagreed with the School  
6 Board's decision and did not sign and return her contract. (Complainant's exhibit  
7 B.)

8 5. The School Board's decision to single out Mrs. Newman with respect to  
9 withholding a salary increase for the 1975-76 school year precipitated the unfair  
10 labor practice charge. Mr. Keedy argued in Mrs. Newman's behalf that the School  
11 Board discriminated against Mrs. Newman by withholding a salary increase because  
12 of her affiliation with the MEA. He offered circumstantial evidence which he  
13 characterized as "overclaiming" to support this allegation. Specifically, he  
14 pointed to the following facts:

15 a. Mrs. Newman was the only teacher in the school district and possibly the  
16 Kalispell area who did not receive some increase in salary for the 1975-76 school  
17 year.

18 b. Mrs. Newman has taught in the school district longer than at least two  
19 of the other three teachers in the school district and it appears that this  
20 instance was the first time that a teacher had been singled out for no salary  
21 increase.

22 c. Mrs. Newman is the only teacher in the school district that is a member  
23 of the MEA.

24 d. Mrs. Newman was also singled out from the other teachers when she was  
25 told she had to follow her contract to the letter.

26 e. Mr. Wittlake made remarks which Mr. Keedy has characterized as "sarcastic"  
27 and "disrespectful" towards the MEA and indicative of Mr. Wittlake's attitude  
28 concerning Mrs. Newman's membership in the MEA. (See point of fact #6.)

29 Through testimony, Mr. Keedy offered the rationale that because Mrs. Newman  
30 had utilized her membership in the MEA to effectively reverse the School Board's  
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1 decision of non-renewal of her contract, the School Board was now punishing her  
2 by withholding any salary increase for the 1975-76 school year.

3       6. As aforementioned, the unfair labor practice charge mentioned "sarcastic"  
4 and "disrespectful" remarks allegedly made by Mr. Wittlake. The record shows  
5 that at the April 7, 1975, School Board meeting, Mr. Wittlake told Mr. Keedy that  
6 the "MEA is nothing but a teacher's union." Mr. Keedy testified that the tone  
7 of this remark was objectionable.

8       Mr. Wittlake also gave his opinion on pending legislation before the state  
9 legislature concerning the collective bargaining rights of teachers and expressed  
10 his disapproval of this legislation because it infringed upon the managerial  
11 rights of the School Board.

12       At the June 9, 1975, School Board meeting at which individual contracts were  
13 issued to teachers of the district, Mr. Wittlake made the remark "I don't like  
14 these outsiders coming in and trying to tell the School Board what to do."  
15 Mrs. Newman took this reference to "outsiders" to mean Mr. Keedy and the MEA.

16       Mr. Wittlake testified that he was referring to Mr. James Newman (Mrs. Newman's  
17 husband) because of Mr. Newman's comments to the School Board with respect to the  
18 permissive levies available to the school district and representative MEA wage  
19 scales. Mr. Wittlake testified further that he did not like Mr. Newman's opinions  
20 and felt they were unwarranted because Mr. Newman was not a taxpayer in the  
21 Batavia School District.

22       In the same conversation, Mr. Wittlake stated that "he did not like Mr. Keedy's  
23 tactics." Mr. Wittlake testified that the reason he made this remark was  
24 because Mr. Keedy initially represented himself on March 10, 1975, as Mrs. Newman's  
25 attorney and did not indicate to Mr. Wittlake that he was an MEA representative.<sup>6</sup>  
26 He further testified that he didn't like Mr. Keedy telling him that "you will  
27 have this meeting with me or you'll be sorry."<sup>7</sup>

28       7. Mrs. Newman testified that she had been thwarted by the School Board in her

30       6. This may have been the case at the time of the first conversation  
31 between Mr. Wittlake and Mr. Keedy but it appears that Mr. Wittlake  
32 knew that Mr. Keedy was an MEA representative by the following day.

7. The meeting referred to here is Mrs. Newman's request for a  
hearing on the charges brought against her.

1 attempts to interest other teachers in the school district in joining the  
2 MTA. However, there is no direct evidence on the record to support this  
3 allegation.

4       8. Through the course of the hearing, Mr. Reedy objected to testimony and  
5 evidence concerning Mrs. Newman's professional competency. He argued  
6 that any evidence the School Board had to offer with respect to Mrs. Newman's  
7 professional competency in order to justify the action of withholding her  
8 salary increase was effectively made irrelevant to this case because of the  
9 School Board's rescission of the decision not to renew Mrs. Newman's teaching  
10 contract. He went further and argued that the effective result of the  
11 hearing held April 7, 1975 was to refute charges specified in the letter  
12 dated March 24, 1975 (complainant's exhibit 8) and that the School Board's  
13 defense for their actions in this case was without merit if it is based on  
14 those charges.

15       I continually deferred from ruling on these objections until I was  
16 forced to do so. Both sides were on the verge of presenting cases they had  
17 presented in the April 7, 1975 School Board meeting which dealt specifically  
18 with Mrs. Newman's professional competency.

19       The School Board attempted to introduce a number of letters allegedly  
20 from parents who were disgruntled with Mrs. Newman's teaching performance.  
21 Mr. Reedy attempted to introduce a petition, signed by a number of parents,  
22 which purportedly attested to Mrs. Newman's competency. I ruled that I  
23 would not permit these offers of evidence on the record and gave as a rationale  
24 for this ruling that it is my responsibility to determine whether or not the  
25 School Board is engaging in an unfair labor practice and not to determine  
26 Mrs. Newman's professional competency.<sup>8</sup>

27       9. Mr. Wittlake testified that a salary increase was not given to Mrs.  
28 Newman because the School Board felt she did not merit a salary increase.  
29 He testified:

30       "What it all boils down to is, I believe as far as the complaint  
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32       8. Of course it is essential to explore the School Board's motivation for taking  
the action of withholding a salary increase, but I had to make the decision  
as to how far this point should be pursued.

1 against myself and the School Board--is that we have based Mrs.  
2 Newman's salary on the basis on which we think her ability has  
3 been--the ability she showed us last year and not--it did not  
have anything to do with her affiliation with the MEA."

4 Mr. Wallace Vintage, County Superintendent of Schools, testified  
5 that although infrequent, salary increases are withheld from individual  
6 teachers if a school board unilaterally determines that an individual  
7 teacher does not merit an increase. He did testify however that collective  
8 bargaining has in most instances eliminated this practice.

#### 9 DISCUSSION

10 The basic determination that has to be made in this case is to decide  
11 whether or not the School Board discriminated against Mrs. Newman by withholding  
12 a salary increase in an effort to discourage membership in her affiliate labor  
13 organization. Section 59-1605(1)(c) R.C.M. 1947 reads in part:

14 It is an unfair labor practice for a public employer  
15 to discriminate in regard to hire or tenure of employment  
or any term or condition of employment to encourage  
16 or discourage membership in any labor organization . . . (emphasis added)

17 Because identical language is found in Section 8(a)(3) of the National  
18 Labor Relations Act, it is useful to examine precedent established by the  
19 National Labor Relations Board in this area. In the benchmark case of  
20 Radio Officers' Union Versus the NLRB,<sup>9</sup> the Supreme Court explained:

21 The language of 8(a)(3) is not ambiguous. The unfair labor practice  
22 is for an employer to encourage or discourage membership by means of  
discrimination. Thus this section does not outlaw all encouragement  
23 or discouragement of membership in labor organizations; only such  
is accomplished by discrimination is prohibited. Nor does this  
section outlaw discrimination in employment as such; only such  
discrimination as encourages or discourages membership in a labor  
24 organization is proscribed.

25 Essentially it is the employer's purpose which determines if the employer  
26 is engaging in an unfair labor practice when the employer discriminates among  
27 his employees.

28 Often, in cases where discrimination has in fact taken place, direct evidence  
29 such as threats, coercion, and promises is difficult to obtain. It is in such  
30 cases that "reasonable inferences from evidence presented"<sup>10</sup> must be drawn to

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31 9. Republic Aviation Corp v. NLRB, 330 US 793, 16 AFTR2d 1988.  
32 10. Idid.

1 determine whether or not a violation has occurred.

2 Thus in the case at hand where direct evidence of discrimination is absent,  
3 Mr. Keedy's arguments based on circumstantial evidence must be carefully  
4 considered. He has specifically pointed to the Board's decision to withhold  
5 a salary increase; related this to Mrs. Newman's affiliation in the MEA; and called  
6 attention to certain remarks made by School Board members to substantiate  
7 his case.

8 However, after carefully weighing the entire record, I find that the  
9 preponderance of evidence in this case does not support the allegation that it  
10 was Mrs. Newman's MEA affiliation which resulted in the withholding of her salary  
11 increase. As I see it, Mrs. Newman did not receive a salary increase because of  
12 the poor management practices of the School Board and the School Board's basic  
13 insistence that she did not merit an increase. Mr. Wittlake and the School  
14 Board have maintained that salary increases are awarded on a meritorious basis.  
15 Yet it is difficult to understand how the School Board determines merit or lack of  
16 merit as there was no real evaluation procedure utilized and even salary schedules  
17 are not maintained.

18 It is a fact that there was a conflict between Mrs. Newman and the School Board  
19 well before the MEA actively moved to represent Mrs. Newman. Further, there is no  
20 evidence that the School Board had ever interfered with Mrs. Newman's participation  
21 in the MEA.

22 Mr. Keedy has in essence argued that the School Board's action in resinding  
23 its decision not to renew Mrs. Newman's contract constitutes an admission that Mrs.  
24 Newman is competent and therefore should be dealt with on an equal basis with other  
25 teachers in the district. He contends further that the School Board, failing to  
26 justify its action of non-renewal, has taken the next alternative of withholding  
27 a salary increase and that this was done because of Mrs. Newman's utilization  
28 of the MEA. I believe the first part of his argument to be correct, but the second  
29 part dealing with Board's motivation is in my judgement incorrect.

30 I have carefully considered the remarks noted in finding of fact number five.  
31 Yet the law does not suppress the right of management nor labor to freedom of  
32 expression. Admittedly the remarks made by Mr. Wittlake coupled with the School

1 Board's actions are not easily dismissed. However, from the foregoing discussion,  
2 and the fact that there is no direct evidence of threats or coercion against  
3 Mrs. Newman with respect to her REA affiliation, I dismiss the charge.  
4

5 CONCLUSIONS OF LAW

6 The School Board did not discriminate against Mrs. Gwendolyn A. Newman  
7 in order to discourage membership in her affiliate labor organization.  
8 Therefore, Mrs. Newman was not restrained from exercising her collective  
9 bargaining rights as guaranteed under Section 59-1603, R.D.L. 1947.

10 RECOMMENDED ORDER

11 The unfair labor practice charge filed by Mrs. Gwendolyn A. Newman  
12 against the Batavia School District No. 26 and the Batavia Board of Trustees  
13 of July 28, 1975, is hereby dismissed.

14 DATED: 29th day of January, 1976

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Mardell R. Brown  
Hearing Examiner

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